

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BILLY DRIVER, JR.,

Plaintiff,

v.

KIMBERLY J. MUELLER, et al.,

Defendants.

No. 2:23-cv-1233 DAD KJN P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a state prisoner, proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and seeks leave to proceed in forma pauperis. Plaintiff subsequently filed various other motions. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

As discussed below, plaintiff's motions are denied, and it is recommended that plaintiff's motion for in forma pauperis status be denied.

I. Motions for VDRP

Plaintiff asks that this case be referred to VDRP, the court's Voluntary Dispute Resolution Program. (ECF Nos. 6 & 9.) However, under Local Rule 271, all prisoner petitions and prisoner civil actions are excluded from the court's VDRP program. Local Rule 271(a)(2). Because plaintiff is a state prisoner bringing a civil rights action, he is not eligible for referral to VDRP. His motions are denied.

II. Motion for In Forma Pauperis Status

In Forma Pauperis Statute

The Prison Litigation Reform Act of 1995 (“PLRA”) permits a federal court to authorize the commencement and prosecution of any suit without prepayment of fees by a person who submits an affidavit demonstrating that the person is unable to pay such fees. However,

[i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g).

Such “three strikes rule” was part of “a variety of reforms designed to filter out the bad claims [filed by prisoners] and facilitate consideration of the good.” Coleman v. Tollefson, 135 S. Ct. 1759, 1762 (2015) (quoting Jones v. Bock, 549 U.S. 199, 204 (2007)). If a prisoner has three strikes under § 1915(g), the prisoner is barred from proceeding in forma pauperis unless he meets the exception for imminent danger of serious physical injury. See Andrews v. Cervantes, 493 F.3d 1047, 1052 (9th Cir. 2007). To meet this exception, the complaint of a three-strikes prisoner must plausibly allege that the prisoner was faced with imminent danger of serious physical injury at the time his complaint was filed. See Williams v. Paramo, 775 F.3d 1182, 1189 (9th Cir. 2015); Andrews, 493 F.3d at 1055.

Has Plaintiff Sustained Three Strikes?

Review of court records reveals that on at least three occasions lawsuits filed by the plaintiff have been dismissed on the grounds that they were frivolous or malicious or failed to state a claim upon which relief may be granted. Indeed, many judges have previously found that plaintiff has accrued three strikes. See Driver v. IRS of Fresno, California, 2022 WL 2093728 (E.D. Cal. June 10, 2022), findings and recommendations adopted, 2022 WL 4123875 (E.D. Cal. Sept. 9, 2022); Driver v. Fresno US Court, 2022 WL 2442746 (E.D. Cal. June 7, 2022), findings and recommendations adopted, 2022 WL 2718556 (E.D. Cal. July 13, 2022); Driver v. Garry, 2020 WL 4349853 (E.D. Cal. July 29, 2020), findings and recommendations adopted, 2020 WL

5943678 (E.D. Cal. Oct. 7, 2020); Driver v. Harber-Pickens, 2020 WL 104493 (E.D. Cal. Jan. 9, 2020), findings and recommendations adopted, 2020 WL 1865659 (E.D. Cal. Apr. 14, 2020); Driver v. Mora, 2014 WL 12966003 (C.D. Cal. Aug. 18, 2014), findings and recommendations adopted, 2015 WL 13915004 (C.D. Cal. Jan. 20, 2015).

The court takes judicial notice of the cases set forth above and plaintiff's prior filings described therein. MCIC Indem. Co. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1986) (A court may take judicial notice of its own records and the records of other courts). Those cases include: (1) Driver v. Martel, No. 08-cv-1910 GEB EFB (E.D. Cal. Sept. 15, 2009 (dismissed September 16, 2009, for failure to state a claim), aff'd, Driver v. Martel, 395 F. App'x 392 (9th Cir. 2010), cert. denied, 563 U.S. 909 (2011)); (2) Driver v. Kelso, No. 2:11-cv-2397 EFB P (E.D. Cal. Aug. 9, 2012) (dismissed September 12, 2012, for failure to file an amended complaint after prior complaint was dismissed for failure to state a claim), aff'd, 514 F. App'x 662 (9th Cir. 2013); (3) Driver v. Zamora, No. 2:14-cv-02170 BRO AGR (C.D. Cal. (dismissed for failure to file an amended complaint after prior complaint was dismissed for failure to state a claim); aff'd, 621 F. App'x 421 (9th Cir. 2015); (4) Driver v. Epp, No. 2:12-cv-00589 EFB (E.D. Cal.) (dismissed September 5, 2012, for failure to state a claim); (5) Driver v. U.S. Special Master, No. 1:17-cv-0202 DAD BAM P (E.D. Cal. 2018) (dismissed Jan. 5, 2018, for failure to pay the filing fee after being declared a three-strike litigant and for failure to obey a court order). These strikes all occurred prior to plaintiff filing this action on June 27, 2023. (ECF No. at 1.)

Does Plaintiff Meet Exception?

Because plaintiff has accrued three strikes, he is precluded from proceeding in forma pauperis in this action unless he is "under imminent danger of serious physical injury. 28 U.S.C. § 1915(g). The availability of the imminent danger exception turns on the conditions a prisoner faced at the time the complaint was filed, not at some other later time. See Andrews, 493 F.3d at 1053. "[A]ssertions of imminent danger of less obviously injurious practices may be rejected as overly speculative or fanciful." Id. at 1057 n.11. Imminent danger of serious physical injury must be a real, present threat, not merely speculative or hypothetical. To meet his burden under § 1915(g), an inmate must provide "specific fact allegations of ongoing serious physical injury, or

1 a pattern of misconduct evidencing the likelihood of imminent serious physical injury.” Martin v.
 2 Shelton, 319 F.3d 1048, 1050 (8th Cir. 2003). “Vague and utterly conclusory assertions” of harm
 3 are insufficient. White v. Colorado, 157 F.3d 1226, 1231-32 (10th Cir. 1998). That is, the
 4 “imminent danger” exception is available “for genuine emergencies,” where “time is pressing”
 5 and “a threat . . . is real and proximate.” Lewis v. Sullivan, 279 F.3d 526, 531 (7th Cir. 2002).

6 Here, plaintiff provides no specific facts demonstrating he is at risk of real and imminent
 7 danger.¹ Plaintiff states he meets the requirement to show imminent danger (ECF No. 1 at 1), and
 8 refers to “imminent danger,” but he does not provide facts explaining or describing such danger.
 9 Plaintiff claims he has been unable to make copies and some of his grievances were thrown in the
 10 trash, but he fails to explain how such allegations constitute a threat of imminent danger of
 11 serious physical injury. In addition, plaintiff sets forth various medical conditions but also does
 12 not attribute any of them to a threat of imminent physical danger.

13 Because plaintiff fails to make a “plausible allegation” that he faced imminent danger of
 14 serious physical injury at the time he filed this action, he is not entitled to the privilege of
 15 proceeding in forma pauperis. See Andrews, 493 F.3d at 1055; Rodriguez v. Cook, 169 F.3d
 16 1176, 1180 (9th Cir. 1999) (finding that 28 U.S.C. § 1915(g) “does not prevent all prisoners from
 17 accessing the courts; it only precludes prisoners with a history of abusing the legal system from
 18 continuing to abuse it while enjoying IFP status”); see also Franklin v. Murphy, 745 F.2d 1221,
 19 1231 (9th Cir. 1984) (being granted in forma pauperis status is a “privilege and not a right.”).

20 Thus, plaintiff must submit the appropriate filing fee in order to proceed with this action.

21 III. Miscellaneous Motions

22 On July 20, 2023, plaintiff filed a state court form styled “Request for Accommodations,”
 23 in which plaintiff requested that the caption of this case be changed, that Judge Drozd recuse

24 ¹ In his complaint, plaintiff claims that defendants Mueller and Drozd, both U.S. District Court
 25 Judges, deprived plaintiff of his access to the court based on their rulings in prior cases. On June
 26 17, 2023, plaintiff told social worker Barnes that the Sgt. in ICF/PIP psychiatric was not allowing
 27 plaintiff to make copies or attend the law library to make copies. As injury, plaintiff sets forth
 28 various medical conditions, states he has suffered scrapes and bruises, grievances are thrown in
 the trash, and alleges 100 of his lawsuits were wrongfully dismissed. As relief, plaintiff requests
 that (1) the court reinstate his civil actions cases 2:23-cv-0393 DAD AC, and 23-cv-0209 DAD
 JDP; (2) assign Chief Judge Mueller to all of plaintiff’s cases currently pending in the Eastern
 District; and (3) the court investigate this case.

1 himself from this case because plaintiff named Judge Drozd in a civil action, and that plaintiff be
2 appointed counsel. Plaintiff is advised that this case retains the caption of plaintiff's original
3 complaint. Plaintiff provides no specific facts to support his motion for recusal; simply naming a
4 judge as a defendant in a civil case is insufficient to demonstrate that a reasonable person would
5 believe that Judge Drozd's impartiality could be questioned. See United States v. Hernandez, 109
6 F.3d 1450, 1453 (9th Cir. 1997) (setting forth standard of review and discussing standard for
7 recusal under 28 U.S.C. §§ 144 and 455).

8 Finally, district courts lack authority to require counsel to represent indigent prisoners in
9 section 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In
10 exceptional circumstances, the court may request an attorney to voluntarily represent such a
11 plaintiff. See 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991);
12 Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). When determining whether
13 "exceptional circumstances" exist, the court must consider plaintiff's likelihood of success on the
14 merits as well as the ability of the plaintiff to articulate his claims pro se in light of the complexity
15 of the legal issues involved. Palmer v. Valdez, 560 F.3d 965, 970 (9th Cir. 2009) (district court
16 did not abuse discretion in declining to appoint counsel). The burden of demonstrating
17 exceptional circumstances is on the plaintiff. Id. Circumstances common to most prisoners, such
18 as lack of legal education and limited law library access, do not establish exceptional
19 circumstances that warrant a request for voluntary assistance of counsel.

20 Having considered the factors under Palmer, the court finds that plaintiff failed to meet his
21 burden of demonstrating exceptional circumstances warranting the appointment of counsel at this
22 time.

23 Thus, all of the motions contained in plaintiff's July 20, 2023 filing are denied. (ECF No.
24 8.)

25 Accordingly, IT IS HEREBY ORDERED that:

- 26 1. Plaintiff's motions for VDRP referral (ECF Nos. 6 & 9) are denied; and
- 27 2. Plaintiff's motions (ECF No. 8), including the motion for appointment of counsel, are
28 denied.

Further, IT IS RECOMMENDED that:


1. Plaintiff's motion to proceed in forma pauperis (ECF No. 2) be denied;

2. The court find plaintiff accrued three strikes under 28 U.S.C. § 1915(g) prior to filing this action; and

3. The court order plaintiff to pay the \$402.00 filing fee in order to proceed with this action.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days after being served with these findings and recommendations, plaintiff may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may result in a waiver of the right to appeal the district court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: July 27, 2023


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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